

BEFORE THE
Federal Communications Commission
 WASHINGTON, D.C

In the Matter of:

Amendment of Section 73.202(b)
 Table of Allotments
 FM Broadcast Stations

Hazlehurst, Utica and
 Vicksburg, Mississippi

) MM DOCKET NO. 93-158
) RM No. 8239

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: Chief, Policy and Rules Division

**OPPOSITION TO SUPPLEMENTAL COMMENTS
 OF DONALD B. BRADY**

Willis Broadcasting Corporation ("Willis") by Counsel, respectfully submits its Opposition to the Supplemental Comments of Donald B. Brady ("Comments") filed by Donald B. Brady ("Brady") in the above-captioned proceeding on January 5, 1994.¹ Willis requests that the Commission reject Brady's Comments because they are both procedurally and substantively defective.

1. *Brady's Comments are Grossly Untimely.*

Brady's Comments are filed nearly five months after the date set in the Notice of Proposed Rule Making ("NPRM") for filing of Comments in the above-captioned proceeding. As Willis and its predecessor, St. Pe' Broadcasting, Inc. have already argued, Brady's original expression of interest was untimely filed and thus should not be considered in connection with the requested upgrade. Moreover, even assuming that Brady's expression of interest had been timely filed, it nevertheless

¹Willis filed a Consent Motion for a short extension of time in which to file the instant Comments on January 18, 1994.

would have been irrelevant because the requested upgrade is not subject to competing applications or expressions of interest, as an incompatible channel swap protected from competition under §1.420(g).

The instant Comments filed by Brady attempt to refute, for the first time, that the proposed upgrade is not, in fact, an incompatible channel swap. The Commission's Rules clearly provide that, after the dates for filing of Comments and Replies has passed, (both of which are designed to afford interested parties reasonable time to submit their views) ". . . No additional comments may be filed unless specifically requested or authorized by the Commission." 47 C.F.R. §1.415(d). Even assuming, arguendo, that Brady's original expression of interest could be considered and that Brady is an interested party in this proceeding, the instant Comments violate §1.415(d) of the Rules, and must be rejected out of hand. Brady could have and should have made his argument refuting St. Pe's and Willis' original position that the proposed upgrade involved an incompatible channel swap in timely-filed Comments. Not only did Brady miss the original deadline for such Comments and expressions of interest, his pleading which set forth his expression of interest contained no argument refuting St. Pe's claim that an incompatible channel swap was involved. Brady has waited until the eleventh hour to raise this argument. Brady has not even seen fit to file a motion for leave to file his supplemental comments, a pleading which, under the circumstances, would have been the minimum required for consideration.

Brady's Comments are grossly untimely, are submitted in violation of the Commission's Rules, and lack the necessary accompanying motion that would permit the FCC to even begin to consider such Comments. Accordingly, Brady's Comments

are fatally procedurally defective and should be rejected without further consideration.

2. *Brady's Comments Lack Substantive Merit.*

Brady's current pleading does nothing to assist the Commission in resolving the instant rule making proceeding. Rather, Brady's arguments are confused and erroneous, and serve only to delay the instant proceeding.

a. Brady's Argument That No Incompatible Channel Swap is Involved is Erroneous.

Brady argues that the proposed upgrade does not involve an incompatible channel swap because another Class A channel is available for allocation at Hazlehurst, Mississippi. In Modification of FM Broadcast Licenses to Higher Class Co- Channel or Adjacent Channels,² the Commission set forth a sample channel swap as an example of how the proposed *upgraded* channel was not available for application in the Ashbacher sense. That is true here, and it has not been disputed that Channel 265C2 is the only upgraded channel available in Utica. Brady is correct that the Commission further stated in FM Channel Assignments, Blair, Nebraska³ that the exchanged channel "must be the only channel which can be substituted at Community B." However, Brady is wrong with respect to his assumption that 282A can be used instead of 225A at Hazlehurst. As set forth in the original Petition for Rule Making in this proceeding, it is proposed to substitute Channel 225A at Hazlehurst *at the existing WMDC (FM) site*. In its timely filed Comments and Counterproposal, St. Pe' reiterated its position regarding the fact that the proposed substitutions involved an incompatible channel swap; the Technical Exhibit

²60 RR 2d 114, 120 at para. 24, ("FM License Upgrading").

³8 FCC Rcd 4086, 4088 (MMB, 1993).

submitted with St. Pe's Comments and Counterproposal stated unequivocally that " . . . There are no other Class A channels which can be substituted in Hazlehurst, Mississippi at the present WMDC (FM) site."⁴ While Brady may have established that channel 282A is *also* available at Hazlehurst, he has not established that Channel 282A can be utilized at Hazlehurst by Station WMDC *at its present tower site*. A proponent of a channel substitution may not impose a requirement for relocation of transmitter site on a Licensee whose channel is proposed to be substituted. FM Channel Assignments, Boalsburg, PA, 3 FCC Rcd 6116 (1988). The site proposed by Brady is restricted, and is significantly removed from the present WMDC (FM) site. Only Channel 225A has been shown to be available for use by WMDC (FM) as part of the proposed swap of channels between WMDC (FM) and WJXN (FM). Thus, Brady has failed to refute the fact that the channel swap between Utica and Hazlehurst is mutually exclusive, or that the channels would be available for application by other interested parties.

It should be further noted that the Commission, in its Report and Order in FM License Upgrading, noted that the mutually exclusive relationships that exist in proposed channel swaps like the one proposed here are *similar*, but not identical to the mutually exclusive relationships that exist in co- and adjacent channel upgrades. Nevertheless, the Commission indicated its willingness to consider proposed channel swaps on a case-by-case basis to determine whether, in fact, a mutually exclusive relationship is created. That relationship exists in this case. Here, Brady has not disputed that such a relationship exists between the channels as proposed. The fact

⁴Comments and Counterproposal, Technical Exhibit, at para. 3.

that an additional channel may be allocated to Hazlehurst from a different site does nothing to change the mutual exclusivity set forth in the proposal.

Furthermore, St. Pe' and Willis have established that a channel swap is in the public interest, since it would allow for a prompt modification of the WJXN License, and for a speedy improvement in coverage not only for the WJXN (FM) signal area, but also for the WMDC (FM) and WVVB (FM) signal coverage areas up to their full 6 kilowatt potential. Providing expeditiously for improved coverage for three stations is in the public interest.

b. Brady's Argument that the NPRM is a 'Final Order' is Erroneous

Brady argues that the language of the NPRM in this proceeding negated St. Pe's proposal for an incompatible channel swap, and requires the Commission to accept competing expressions of interest in the proposed upgraded channel. However, there is nothing in the NPRM to suggest that the Commission actively disagreed with St. Pe's proposal of an incompatible channel swap, and it is likely that the Commission simply overlooked that factor in its NPRM.

However, Brady argues that the NPRM is a 'Final Order', and that all parties are stuck with the Commission's pronouncement that a modification could not be implemented if an expression of interest were filed, unless an equivalent class of channel were allocated. This rather novel position is untenable in view of the nature of Rule Making proceedings in general, and especially in view of the Commission's failure here to address St. Pe's position that an incompatible channel swap was involved.

The very purpose of Rule Making proceedings is to allow interested parties to submit their views, which may require the FCC to modify the positions initially proposed in the NPRM. It is ludicrous to suggest that any position proposed by the

Commission in an NPRM must be viewed as a hard and fast position which cannot be changed except on appeal. As the title suggests, the Commission publishes a "Notice of *Proposed* Rule Making" which *initiates*, rather than terminates a proceeding. The FCC *invites* comments and suggestions from interested parties. In no way does an NPRM meet the definition of a 'Final Order', as that term is defined in Bethesda-Chevy Chase Broadcasters, Inc. v. FCC, 385 F.2d 967 (D.C. Cir. 1967) or elsewhere. Thus, if the Commission, in the first instance, overlooked the fact that the proposal involved an incompatible channel swap, the parties were entitled to bring this fact to the Commission's attention in their timely-filed Comments. St. Pe' did just that in its timely filed Comments and Counterproposal. The Commission is entitled to take note of St. Pe's Comments and argument, and is thus not precluded from changing its initial position regarding modification of the WJXN (FM) license to allow for the requested upgrade.

3. Conclusion.

Brady's substantive arguments are both erroneous and spurious. It is apparent that the only purpose served by filing of such Comments is delay in resolution of this proceeding. Brady's participation at this junction seems to be just a case of "sour grapes"; since he will be precluded from applying for the upgraded channel because of his untimely-filed expression of interest,⁵ Brady is now interested only in blocking or delaying the proceeding, and delaying improved service to the communities involved. Brady's Comments should be rejected, and the

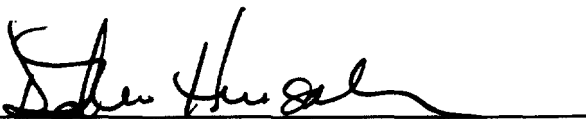
⁵As previously argued by St. Pe' and Willis, no timely expression of interest was filed by any party. Regardless of whether an equivalent Class C channel is available at Utica or not, the channel substitutions and the requested modifications may be granted as originally requested.

Commission should act promptly in resolving this proceeding, thereby permitting improved service as proposed herein.⁶

WHEREFORE, the foregoing concluded, Willis requests that the Commission REJECT Brady's Comments filed on January 5, 1994 as procedurally and/or substantively defective, and GRANT Willis' Petition to amend the FM Table of Allotments to substitute Channel 265C2 for Channel 225A at Utica, Mississippi and to modify the authorization for WJXN (FM) to specify operation on Channel 265C2; to substitute Channel 225A for Channel 265A (as licensed) at Hazlehurst, Mississippi and to modify the authorization of WMDC (FM) to specify operation on Channel 225A; and to substitute Channel 267A for Channel 266A at Vicksburg, Mississippi, and to modify the authorization of WVVB (FM), Vicksburg Mississippi to specify operation on Channel 267A.

Respectfully submitted,

WILLIS BROADCASTING CORPORATION

By: 

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January 21, 1994

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⁶Prompt resolution of this proceeding would also permit upgraded service as proposed by Crossroads Communication, Inc. in MM Docket No. 91-131. St. Pe' and Willis have already indicated their partial agreement with Crossroads' Petition for Extraordinary Relief, insofar as that Petition urged grant of St. Pe's proposal in the instant Rule Making.

CERTIFICATE OF SERVICE

I, David M. Hunsaker of the Law Firm of **Putbrese & Hunsaker**, hereby certify that I have on this 21st day of January, 1994, sent, by United States Mail, Postage prepaid, copies of the foregoing, "**Opposition To Supplemental Comments of Donald B. Brady**" to the following:

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